Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Compatibility Between Cable	)	
Systems And Consumer	)	PP Docket No. 00-67
Electronics Equipment	)	

Reply Comments of the
Home Recording Rights Coalition

In its comments filed on May 24, the Home Recording Rights Coalition ("HRRC") expressed its concern that the Commission, the industry, and consumers had reached a pivotal stage in the controversy over the reasonable and customary home video practices that have brought freedom to consumers, and new markets and prosperity to Hollywood.[1] HRRC warned that such freedoms may fall victim to strategic agendas of production and distribution interests, who seek to use the opportunity of new licenses, at least one of which is squarely within the FCC's jurisdiction, to gain controls over consumer behavior that could not be garnered either through freely negotiated agreements or through legislation.[2] The comments by representatives of these interests bear out our fears. Quite significantly, they fail to show that such consumer impositions are not the Commission's business. Hence, the issues of consumer freedom, competition, and balanced copyright provisions are joined. The clear task for the FCC is to assure that they are resolved in a manner fair to consumers, who after all must be persuaded of the value of new technology before making a substantial investment in it for the benefit of everyone.

I. The DFAST License Is Clearly Within The Commission's Jurisdiction.

None of the commenters goes so far as to challenge the FCC's jurisdiction over the "DFAST" license, offered by CableLabs, on behalf of the Cable industry, as part of the process being overseen by the Commission in CS Docket 97-80.[3] The

[1] HRRC Comments at 1-2.

[2] HRRC Comments at Section I.

[3] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Docket No. 97-80, *Report & Order*, 13 FCC Rcd 14775 (Rel. June 24, 1998) (*Navigation Device R&O); Order on Reconsideration*, 14 FCC Rcd 7596 (Rel. May 14, 1999) (*Navigation Device Reconsideration Order*).

Commission responded to NCTA offers to assume such a responsibility, in preference to the Commission setting device standards itself.[4] HRRC, along with CEA, Circuit City, Thomson, and Philips, pointed out that the one-sided, unbalanced copy control and home network provisions of the draft DFAST license are prohibited by the injunction, in FCC regulations, against license impositions on the "right to attach," and are not within the exception for provisions that would protect MSO conditional access or network security regimes.[5]

HRRC also pointed out that, even had it not included such prophylactic regulations, the FCC has publicly undertaken an obligation to oversee the Cable industry implementation, under threat of sanction, of its obligations to the Commission.[6] In his separate statement upon the release of the Navigation Device Report & Order, Chairman Kennard said:

> We must recognize that this item is the beginning of a long process. There are many questions and issues that will arise during the development of new set top boxes and other navigation devices that the Commission may need to address. Many of these issues were raised late in this proceeding and are better addressed with the benefit of a full record, but that fact does not diminish their importance.[7]

That the FCC has properly reserved the power to address these issues has not been seriously challenged by any commenter.

A. The Purpose Of FCC Oversight Jurisdiction Is To Prevent New Impositions On The Public As A Device Monopoly Is Replaced By Industry-Wide Licenses.

The context in which the DFAST license is offered is one of congressionally mandated deregulation of a government-sanctioned monopoly on devices. In enacting Section 304 of the 1996 Telecommunications Act, Congress recognized that the law itself, in its concern for cable system security, had fostered a stagnant monopoly on Navigation Devices, which could not be tolerated in the transition to digital technology. Criminal law provisions in 48 states, backed by Federal law and Commission regulations, make it a crime to trespass on MSO technology protecting

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[4] *Navigation Device R&O ¶ 14, 125.*

[5] CEA Comments at Section IV; Circuit City Comments at Section V; HRRC Comments at Section II; Philips Comments at 8; Thomson Comments at 7.

[6] HRRC Comments at 12.

[7] *Navigation Device R&O*, Statement of Chairman Kennard at 1.

system security or implementing conditional access, or to sell devices that are capable of doing so.[8] It was to open up this government-enforced device monopoly, bounded by a lack of creative options for delivering security circuitry, that the Congress instructed the Commission to, "in consultation with appropriate industry standard-setting organizations, adopt regulations ...."[9]

As it had in the context of telephone CPE deregulation, the Commission in the Navigation Device docket gave great weight and emphasis to the "right to attach." In the Report & Order, the Commission said:

> We believe, as in the telephone context, that the right to attach leads to a broader market for equipment used with MVPD systems. Manufacturers will have substantial incentive to develop and distribute new products in response to consumer demands for equipment and features, provided that the MVPD system for which the equipment is designed is accessible. *We agree with Time Warner that the marketplace, not the MVPD, should determine the price and features of navigation devices available to subscribers.*[10]

The features of devices that may attach to cable systems are, thus, questions that the Commission clearly intends to be reserved for decision according to the marketplace, rather than according to the strategic objectives of entertainment programming and distribution interests. It is to ensure that such strategic objectives do not nullify the benefits of deregulation that the FCC has retained jurisdiction.[11] In this context, the Commission formulated its prohibition on extraneous contractual limitations, with the sole exception of protection of conditional access and system security:

> In addition to being directly restrained from attaching navigation equipment, consumers must also not be precluded from the possibility of obtaining equipment from commercial outlets *by virtue of contractual or other restrictions on the availability of equipment that the service provider might seek to directly impose on suppliers of equipment.*[12]

B. Copy Protection Cannot Be Equated With Conditional Access.

Entertainment and distribution industry commenters argue that the Commission, in paragraph 63 of the Navigation Device Report & Order, equated

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[8] *See, e.g.*, Cal. Penal Code § 593d; Md. Ann. Code art. 27, § 194B.

[9] Section 304 of the 1996 Telecommunications Act, Pub. L. No. 104-1-4, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 549(a)).

[10] *Navigation Device R&O* ¶ 29 (footnotes omitted) (emphasis added).

[11] *Navigation Device Reconsideration Order,* Statement of Commissioner Ness at 1.

"copy protection" with conditional access, and so invited, and relinquished jurisdiction over, the sorts of restrictions on competitive host devices contained in the draft DFAST license.[13] As Thomson shows in commenting on the same paragraph, the better reading of the paragraph would lead an objective observer to the opposite conclusion.[14] The disputed language in this paragraph says, in relevant part:

> [M]any types of navigation devices are now being, or will in the future be, attached to multichannel video programming distribution systems. A number of different entities in the communications stream and a number of types of security, access control, or data encryption systems are involved. *The security separation required by the rules adopted herein is applicable to access controls directly applied by the MVPD to authenticate subscribers' identification.* *** "Copy protection" systems and devices that impose a limited measure of data encryption control over the types of devices that may record (or receive) video content would not be subject to the separation requirement.[15]

The first part of this paragraph, including the italicized language, clearly supports the Philips/Thomson interpretation. The Commission recognized that, although encryption utilized for purposes of copy control has some characteristics of conditional access, it is not the same *type* of system that is used by MSO's to *authenticate subscribers' identification*, and hence is not subject to the separation requirement. It is clearly the latter type of technology that the Commission had in mind as implementing "conditional access" to assure that only properly *identified subscribers* receive signals for viewing. The latter part of the paragraph simply states the obvious consequence of the former – that such "limited measures of data encryption" do not constitute this sort of conditional access, so are not subject to the separation requirement.[16]

Making copy protection a subset of conditional access or theft of service would impose criminal regimes, designed to address signal piracy, onto customary home recording practices of consumers. Hence, taking the step urged by the entertainment and distribution commenters, and equating copy protection with the

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[12] *Navigation Device R&O* ¶ 30 (emphasis added).

[13] MPAA Comments at 7; Viacom Comments at 5.

[14] Thomson Comments at 8. Philips draws the same conclusion from the Commission's Navigation Device rules. Philips Comments at 8.

[15] *Navigation Device R&O* ¶ 63 (emphasis added).

[16] This fact was also noted by Circuit City at Section V.A of its comments.

"type" of conditional access that addresses subscriber authentication, would be a step of major civil liberty consequence for the Commission.

Home recording practices have nothing to do with commercial signal retransmission, unauthorized commercial content reproduction, or other acts of piracy that are criminal offenses. Yet, the new doctrine urged by these commenters would – by equating "conditional access" and "copy protection" – make FCC Navigation Device rules the agent through which the criminal sanctions of existing law would now reach down to and into the consumer's home network.[17]

It is not unlawful and certainly not criminal for a consumer to make a copy of a copyrighted work in the privacy of his or her home. Fair use exists to address only unauthorized recordings.[18] Unlike the entertainment industry, the law recognizes this distinction. The Commission should not criminalize such conduct.

C. Judicial, Legislative And Other License Approaches To Copy Protection All Acknowledge That It Must Be Balanced And Recognize Unauthorized Use, And So Differs From "Conditional Access" And "Security."

Time Warner notes that "copy protection" involves different levels of consumer freedom of action – "copy never," "copy no more (after an initial consumer copy has been allowed)" and "freely copiable."[19] But nowhere in the recitations by motion picture interests, or in the "compliance rules" attached to the DFAST license, is there any sort of balanced statement of when and how these different rules would apply. Such balance has been offered in several copy protection contexts in lieu of case-by-case fair use judicial determinations. Fair use and such "encoding rules" are hallmarks as to why "copy protection" and "conditional access" (which brooks no fair use exceptions) are separate legal and administrative concepts.

Since the Betamax case,[20] the law has recognized that copy protection does not extend so far as preventing consumers from making fair use of certain content through limited copying, let alone directly viewing such content as it is delivered via the airwaves or by wire. The 5C comments illustrate the feasibility of adopting

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[17] *See, e.g.*, 47 U.S.C. § 553; Cal. Penal Code § 593d; Md. Ann. Code art. 27, § 194B all providing for fines and imprisonment for unauthorized reception of cable service.

[18] 17 U.S.C. § 107.

[19] Time Warner Cable Comments at 12.

[20] *Universal City Studios, Inc. v. Sony Corp. of America*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

license terms that preserve and appropriately balance both content provider interests and consumer expectations. Similarly, in 1996, as part of the unenacted draft of the Digital Video Recording Act, the consumer electronics and motion picture industries introduced encoding rules (or "recording rules") as a way of managing copy protection concerns.[21] As acknowledged by Time Warner, these proposed rules anticipated different levels of copy protection depending on the content type.

The manner in which Congress crafted the Digital Millennium Copyright Act[22] highlights the shortcomings of the DFAST license. To the extent this law mandates equipment design obligations in the interest of copy protection, it also includes encoding rule provisions that establish the parameters for when copying is and is not acceptable.

A brief review of the process by which Congress struck this balance may be instructive. As part of its effort to achieve an appropriate balance between the interests of content owners and information users, Congress made fundamental changes to the proposed WIPO implementing legislation. As first proposed, the legislation was entirely one-sided. As enacted, however, it ensured that device manufacturers would not be under an onerous mandate to respond to any and all copy protection schemes,[23] while explicitly establishing a regime to ensure that standard analog VCRs would respond to the best known copy protection technology in use at the time.[24]

A thorough reading of section 1201, entitled "Circumvention of copyright protection systems" shows that, with the exception of subsection 1201(k), the DMCA does not impose any compliance requirements for equipment design. In fact, section 1201(c) makes clear that consumer electronics and information technology product manufacturers are not under any mandate in designing new devices other than to obey the command set forth in section 1201(k) to respect the Macrovision anti-copying technology. In setting forth the requirements for manufacturers to implement copy control technology in analog video recorders,[25] however, section 1201(k) at the same time sets forth encoding restrictions that clearly describe the

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[21] 5C Comments at 4.
[22] Pub. L. No. 105-304, 112 Stat. 2860 (1998).
[23] 17 U.S.C. § 1201(c)(3).
[24] 17 U.S.C. § 1201(k).

circumstances in which such copy control technologies do and do not apply.[26] The FCC should not accept the DFAST license as consistent with its regulations, and congressional intent, unless the parties have included similarly balanced provisions.

II. Motion Picture And Cable Industry Proposals To The Commission Would Eviscerate The Right To Private, Noncommercial Home Recording That The MPAA Has Purported To Acknowledge.

In HRRC's May 24 comments, it pointed out that the MPAA has acknowledged before Congress that, while its members have an interest in protecting digital content, consumers will still be able to enjoy "time shifting" recording in the digital world.[27] However, the comments filed in this proceeding give the HRRC cause for concern that perhaps the MPAA's recognition of consumer recording expectations is not as widespread in the content community as HRRC would have hoped.

A. The Specific Proposals Of Hollywood Studios Do Not Recognize Consumer Home Recording.

Time Warner Cable proposes that licenses should only be granted for host devices that can honor copy protection instructions and that decrypted digital signals should not flow to any "final display circuit of consumer video equipment ... where such decrypted signals can be stored, forwarded, copied or exported."[28] Nowhere in its comments, however, does Time Warner recognize any exception for consumer fair use recording. In fact, the language quoted above clearly indicates Time Warner's support for solutions that impede a consumer's right to make copies that previously would have been considered fair use.

Fox's comments are similarly weighted, with long discussions about the importance of protecting digital content in order to ensure its availability[29] and the ease with which digital content can be "stolen."[30] Fox also more fully develops the alleged risks to broadcasters if their digital content is not fully protected.[31] Like Time Warner, Fox is silent about the ways in which millions of Americans benefit from the ability to watch programming at times that are convenient to them. It is

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[25] 17 U.S.C. § 1201(k)(1)(B).
[26] *Id.* § 1201(k)(2).
[27] HRRC Comments at 6 (referencing congressional testimony of Jack Valenti).
[28] Time Warner Cable Comments at 7.
[29] Fox Comments at 6.
[30] *Id.* at 7-12.
[31] *Id.* at 15-18.

as if these consumer expectations were not relevant in the debate over what constitutes cable compatible equipment.

The HRRC believes the MPAA's representation to Congress regarding the ongoing need for fair use recording must be intertwined in whatever copy protection measures are ever agreed upon through the OpenCable, or any other, license process.

B. The DFAST License Lacks Encoding Rules Or Other Indicia Of Balance.

Like the original WIPO implementing legislation, the DFAST license is entirely one-sided. It gives content owners and distributors the unlimited authority to deny consumers the ability to make a fair use recording of a program. But more disturbingly, it would allow content owners to deny consumers even the opportunity to view a program for which they otherwise had lawful access. It is thus more out of balance than the WIPO scheme Congress rejected as too one sided.

The Commission should not allow content owners or distributors to establish "compliance rules" for devices without establishing balanced "recording rules" for consumers. If there are to be obligations imposed on consumer devices in favor of the content and distribution industries, there must be balancing obligations imposed on these industries to ensure that consumers receive the benefit of their bargain in buying into the digital revolution. The Commission has the authority to accomplish this goal through the exercise of its authority over the DFAST license.

III. Product Interfaces On Which Consumers Now Rely Are In Danger Of Being Terminated.

Consumers have already begun buying DTV sets that would have limited utility in a world in which content owners had the authority to block viewing of programs simply to ensure not a single one was ever copied. If the goal is to speed the rollout of new technology, the last persons that should be hurt are the early adopters. The Commission should ensure that product interfaces on which consumers rely today are not arbitrarily terminated tomorrow.

A. Motion Picture Commenters Propose Exclusive Use Of Interfaces Not Available On DTV Receivers Owned By Consumers.

Viacom, the MPAA and others urge the FCC to allow all digital programming to be scrambled.[32] Consequently, consumers would have to use consumer electronics equipment that has the ability to descramble this content in order to view even basic tier digital programming delivered over cable systems. By content owner accounts, descrambling would be accomplished through some variation of the 1394 interface.[33] Viacom says this should not create any significant consumer burdens because digital television "necessarily requires that consumers acquire additional equipment ... to receive even digital over-the-air signals."[34] This proposal fails to take into account the 220,000-plus digital televisions already owned by consumers.[35]

It would be a serious disservice to these consumers if the FCC were to adopt any requirement that relies on the use of an interface standard that would make existing consumer electronics equipment prematurely obsolete.[36] Insult would be added to consumer injury if the interface standard required is not even needed in order to securely deliver digital content to cable subscribers.

B. Without FCC Oversight, NCTA And CableLabs May Bow To Motion Picture Industry Pressure To Terminate Interface Support.

In so many words, content owners are threatening to withhold content if CableLabs does not conform to their interface and copy protection demands. For example, Viacom says that "without an effective content protection scheme to prevent ... unlawful reproductions and distributions of digital content, content providers will have substantially reduced incentives to develop and make available motion pictures, television programming and other content in digital format...."[37] This theme is echoed by other content providers.[38]

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[32] *See* Fox Comments at 15; MPAA Comments at 7-8; Viacom Comments at 4.
[33] *See* NAB Comments at 6.
[34] Viacom Comments at 4.
[35] CEA Comments at n.10.
[36] Philips Comments at 8; Circuit City Comments at 12-13.
[37] Viacom Comments at 2.
[38] ABC, *et al.* Comments at 3; Turner Broadcasting, *et al.* Comments at 2.

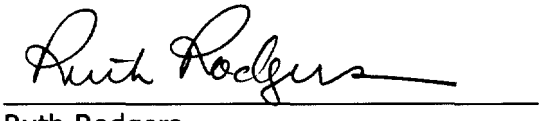
HRRC urges the FCC to use its jurisdiction over Navigation Devices to ensure that the OpenCable licensing scheme does not become an artifice to respond to such pressure, and hence impose unbalanced copy protection standards on competitive equipment manufacturers in the name of "system security." The FCC should not allow or approve any outcome in this proceeding that would empower movie studios to cause DTV sets in the hands of consumers to go dark or fuzzy. By insisting that the DFAST license be revised to include well-balanced recording rules, the FCC can protect consumers against a one-sided deal. It should use the jurisdiction given it by Congress to protect consumers from abuse.

Conclusion

Congress gave the Commission the mandate to empower consumer choice. The last time Congress was asked to impose on consumers the sort of one-sided copying limitations urged by the content industry, it rejected the proposed approach. Instead, in adopting the DMCA, it established a set of rules, including encoding rules, that acknowledged the need for balancing the interests of content owners and information consumers, and in this manner reaffirmed the central importance of fair use to an information society. The FCC should maintain the integrity of its regulations and approve the imposition only of those specifications and licenses that are balanced, fair to consumers and pro-competitive.

Respectfully submitted,

HOME RECORDING RIGHTS COALITION



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Certificate of Service

I, Ruth Rodgers, hereby certify that true copies of the foregoing Reply Comments of the Home Recording Rights Coalition, were served by hand on June 8, 2000, to the persons listed below.

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